## UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 9

In the Matter of :

:

AMERICAN ELECTRIC POWER

AND ITS SUBSIDIARIES APPALACHIAN

POWER COMPANY, INDIANA MICHIGAN

POWER COMPANY, KENTUCKY POWER

COMPANY, KINGSPORT POWER COMPANY, : CASE 9-CA-095384

OHIO POWER COMPANY, PUBLIC SERVICE

:

COMPANY OF OKLAHOMA AND

SOUTHWESTERN ELECTRIC POWER COMPANY

:

and :

:

INTERNATIONAL BROTHERHOOD OF

ELECTRICAL WORKERS, SYSTEM COUNCIL U-9 : AND LOCALS 329, 386, 696, 738, 876, 934, 978, :

1002, 1392 AND 1466, AFL-CIO :

# ANSWERING BRIEF OF CHARGING PARTIES INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, SYSTEM COUNCIL U-9 AND LOCALS 329, 386, 696, 738, 876, 934, 978, 1002, 1392 AND 1466, AFL-CIO, TO RESPONDENTS' EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS

Now come the Charging Parties, International Brotherhood of Electrical Workers, System Council U-9 and Locals 329, 386, 696, 738, 876, 934, 978, 1002, 1392 and 1466, AFL-CIO (hereinafter collectively referred to as the "Union" or "IBEW"), by and through the undersigned counsel and submit this Answering Brief to Respondents' Exceptions to Administrative Law Judge's Decision and Respondents' Brief in Support of Respondents' Exceptions. The IBEW does not concede to or agree with the validity or applicability of any of the statements or arguments raised by Respondents in their Exceptions or their Brief in Support of Respondents' Exceptions, including those not specifically answered or referred to herein.

#### I. STATEMENT OF THE CASE

#### A. Introduction

This is a case in which the Respondents, in November of 2012, acted unilaterally to completely eliminate medical insurance coverage for an entire class of employees for whom they had previously agreed to provide coverage. A Complaint issued by the Acting General Counsel against American Electric Power and its subsidiaries Appalachian Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company, Public Service Company of Oklahoma and Southwestern Electric Power Company (hereinafter collectively referred to as "the Respondents"), based on an unfair labor practice charge filed by the Union. The Complaint alleged that the Respondents violated Section 8(a)(1) and (5) of the Act when they unilaterally eliminated retiree medical benefits for all employees hired after January 1, 2014, without the consent of the Union.

After conducting a hearing on April 29 and 30, 2013, Administrative Law Judge Eric M. Fine (hereinafter referred to as the "ALJ") issued a Decision holding, inter alia, that the Respondents:

By on or about November 27, 2012, failing and refusing to keep in effect all terms of the parties' master collective-bargaining agreement by eliminating retiree medical benefits for all employees hired after January 1, 2014, without the Union's consent, the Respondents violated Section 8(a)(1), (5) and 8(d) of the Act by modifying the parties' master collective-bargaining agreement.

(Administrative Law Judge Decision (hereinafter "ALJD") p. 28).

#### **B.** Statement of Facts

The Union and the Respondents are parties to a Master Agreement effective March 12,

2012 through February 16, 2015, which was negotiated between the parties and covers all of the Local Unions. [Exhibit (hereinafter "Ex.") S-1]. That Master Agreement contains language providing for, among other things, medical benefits. Article X, Section 1 provides in part, "Employees shall be permitted to participate in the American Electric Power System Comprehensive Dental Plan, Comprehensive Medical Plan . . . Retirement Plan, Retirement Savings Plan and Sick Pay Plan. (Emphasis added). (Ex. S-1, Article X)." The Master Agreement defines employees as ". . . regular fulltime and probationary employees who are now or hereafter in the employment of a Company and represented by a Local Union." (Emphasis added). (Ex. S-1, Article I, Section 8(c)).

Article III, Section 2 of the Master Agreement also contains the following language:

It is the intent of the parties that the provisions of this Agreement (meaning Master Agreement and respective Local Agreement for each individual Bargaining Unit) will supersede all prior agreements and understandings, oral or written, expressed or implied, between such parties and shall govern their entire relationship and shall be the sole source of any and all rights or claims which may be asserted in arbitration here under or otherwise.

The parties for the life of this agreement hereby waive any rights to request to negotiate or to negotiate or bargain with respect to any matters contained in this agreement.

From the initial date of this Master Agreement and its predecessor, employees have been provided the right to continue to receive medical care under the comprehensive medical plan after retirement. (Tr., Coleman, p. 23; Cooper, p. 56; Ex. S-1, Article X). However, during the term of the Master Agreement, in November of 2012, the Respondents announced that they were changing that benefit. The Respondents announced that **employees**, including those represented by the Union, hired after January 1, 2014, will no longer be eligible for retiree medical coverage. The Respondents made this change unilaterally and did not bargain this change with the Union. [Transcript (hereinafter "Tr.") Coleman, pp. 23-24; Cooper, p. 142; Ex. S-8, p.1].

#### II. ARGUMENT

The Respondents base all of their Exceptions upon two arguments: 1) that the ALJ erred in finding that Respondents violated the Act because retiree medical benefits for persons hired after January 1, 2014 is a permissive subject of bargaining (Exception Nos. 1-4 and 14-17); and 2) that assuming *arguendo* that the charge did not involve a permissive subject of bargaining, the ALJ erred in concluding that Respondents' unilateral change was not authorized by past practice, Master Contract language, and "Reservation of Rights Language." (Exception Nos. 5-17).

Neither of these arguments, nor any of Respondents' Exceptions have merit. The ALJ thoroughly analyzed each of the arguments raised by Respondents and, having considered the cases cited by Respondents in their Post Hearing Brief (and now principally relied upon in their Brief in Support of Exceptions), correctly rejected those arguments of Respondents.

# A. The ALJ Did Not Err in Holding That Future Medical Benefits of Employees Represented By the Union Are a Mandatory Subject of Bargaining. (Exception Nos. 1-4 and 14-17).

The ALJ correctly concluded that the Respondents committed an unfair labor practice in violation of the Act by modifying the current master agreement without the Union's consent. It is well established that such a unilateral action modifying the terms and conditions set forth in a collective-bargaining agreement without the Union's consent constitutes a violation of the Act. See *Bath Iron Works Corp.*, 345 NLRB 499, 502.

Respondents assert that the ALJ erred by finding that Respondents had a mandatory obligation to bargain with the Union before changing terms and conditions of employees who were to be hired after a certain date. (Brief in Support of Respondents' Exceptions, p. 11). However, this argument is without merit. In the very case relied upon by the Respondents the

U. S. Supreme Court has noted that, while retirement benefits for current retirees are a permissive subject of bargaining, it is well established that **future retirement benefits of current employees are a mandatory subject of bargaining**. *Allied Chemical and Alkali Workers v. Pittsburg Plate Glass Company*, 404 U.S. 157 (1971) at 180. See also *Midwest Power Systems*, *Inc.*, 323 NLRB 404, 406 (1997) noting that "the Supreme Court has clearly stated that the future retirement benefits of current active employees are a mandatory subject of collective bargaining under the Act. Unilateral modification of such benefits constitutes an unfair labor practice."

In the instant case, it is not disputed by the Respondents that for the life of the Master Agreement, employees have been guaranteed medical insurance benefits pursuant to Article X of the Master Agreement. As previously noted, the Master Agreement defines employees as regular fulltime and probationary employees who are now or <u>hereafter</u> in the employment of a Company. (Ex. S-1, Article I, Section 8).

The Respondents rely in part upon the case of *Star Tribune*, 295 NLRB 543 (1989) in support of their assertion that the issue in this case is not a mandatory subject of bargaining. However, *Star Tribune* does not support the Respondents' position in this case. The *Star Tribune* case dealt with "prospective employees," not employees. The language at issue was a requirement imposed upon individuals prior to becoming employees. It required preemployment drug and alcohol testing for **applicants** for employment. The Board held that these applicants for employment were not employees within the meaning of the Act. *Id.* at 546. By contrast, the change made by the Respondents in the instant case does not apply to "applicants" for employment. Rather, by its express terms, it applies only to "**employees**" **hired** after January 1, 2014.

If the Respondents' argument regarding this issue were correct, an employer would virtually be able to unilaterally modify any and all terms and conditions of the collective bargaining agreement, including wages. Under the Respondents' theory, the employer would simply have to announce that any employees hired after a specified date would have different terms and conditions of employment than those employed prior to that date. Employees hired after that date, under the Respondents' theory, could have a completely different set of wages, hours, and terms and conditions of employment. There is simply no authority to support such a proposition. Moreover, the express language of the Master Agreement clearly indicates that the parties intended the term "employees" to cover employees "now or hereafter" hired by the Respondents and represented by the Union.

In the instant case, it is clear that the ALJ correctly concluded that the issue of the modification of a substantial benefit such as retiree medical insurance for employees hired during the term of the collective bargaining agreement is a mandatory, and not permissive, subject of bargaining.

### B. The Claims Are Not Barred By Past Practice, Waiver, or Reservation of Rights. (Exception Nos. 5-17).

#### 1. The Claims Are Not Barred by Waiver.

Respondents assert that the ALJ erred by finding that the IBEW never waived its right to bargain about the elimination of retiree medical benefits. In fact, Respondents assert that "the ALJ erred by applying a "waiver" analysis to a case that does not pose that issue." (Brief in Support of Exceptions, p. 20). However it was Respondents who raised the waiver issue in the first instance. The Second Defense set forth in Respondents' Answer is that the claims are barred by the doctrines of waiver, acquiescence and/or estoppel. (Respondents' Answer to the Complaint at paragraph 12). Respondents except to the ALJ's conclusion that no past practice

or waiver was established due to benefits changed in the past. (Exception No. 5). The Union has not waived its right to bargain over the elimination of medical benefits for retirees, either expressly or by its past conduct. The D.C. Circuit Court of Appeals has stated that "[a] waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a matter . . . . [W]hen a union waives its right to bargain about a particular matter, it surrenders the opportunity to create a set of contractual rules that bind the employer, and instead cedes full discretion to the employer on that matter." Southern Nuclear Operating Co. v. NLRB, 524 F.3d 1350, 1357-58 (D.C. Cir.2008) (quoting Dep't of the Navy, Marine Corps Logistics Base v. FLRA, 962 F.2d48, 57 (D.C. Cir. 1992)). For that reason, this Court requires "clear and unmistakable' evidence of waiver" and "construe[s] waivers narrowly." Id. See also Honeywell Int'l, Inc. v. NLRB, 253 F.3d 125, 133-34 (D.C. Cir. 2001) ("Board correctly concluded that the Union did not clearly and unmistakably waive its protection against post-expiration unilateral termination of severance benefits."). "To find a clear and unmistakable waiver, the evidence must show "that the parties have 'consciously explored' or 'fully discussed the matter on which the union has 'consciously yielded' its rights." Id.132 Id. (quoting Gannett Rochester Newspapers v. NLRB, 988 F.2d 198, 203 n.2 (D.C. Cir. 1993). The Respondents have failed to meet their burden to demonstrate such a waiver.

# 2. No Past Practice Occurred Which Would Allow Respondents to Unilaterally Eliminate Retiree Health Benefits for Employees Hired After January 1, 2014.

While the ALJ Decision does conclude that the Union did not waive its right to bargain over the issue in question, the ALJ also specifically addressed the issue of whether Respondents have established a past practice that occurred with such regularity that it would allow them to unilaterally eliminate the heath care benefits in question. (ALJD, pp. 17-20).

The Respondents allege that their action is supported by a long standing past practice of unilaterally modifying benefits provided under Article X of the Master Agreement. However, the evidence does not support that assertion. At no time had AEP ever eliminated medical insurance coverage for an entire class of employees. (Tr., Cooper, p. 155).

Respondents rely upon the case of *E.I. du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65 (D.C.Cir. 2012) in support of their past practice argument. However, that case is clearly distinguishable from the instant one. In the *du Pont* case the court expressly noted: "Du Pont made the unilateral changes in dispute here after the CBAs had expired, **but those changes were similar in scope to those it had made in prior years**." (Emphasis added). *Id.* at 68. In the instant case the ALJ correctly concluded that the change in benefits which is at issue in the instant case was far different in nature and scope than changes made in the past.

Over the years, the Respondents made a number of changes to the health care benefit plan. Many of these changes were similar to those made in the *du Pont* case. For example, on some occasions, increases in employee premium contributions for medical insurance were implemented. Sometimes co-pays were adjusted. However, at no time had the Respondents ever eliminated medical insurance coverage for an entire class of employees. (Tr., Cooper, p. 155). The Respondents did not just modify premium contributions, co-pays or deductibles for retirees in November of 2012. Rather, for employees hired after January 1, 2014, it completely eliminated all retiree medical benefits. This drastic and dramatic change can hardly be considered "similar in scope to those it had made in prior years", as was the case in *du Pont*.

The Employers' witnesses testified that it has unilaterally modified the terms of the benefit program, but that it has never bargained over those benefits with the Union. However, other testimony and Exhibits offered by the Respondents demonstrate that the parties <u>have</u>

<u>bargained</u> over these benefits. Further, the Exhibits and the testimony of Mr. Dawson demonstrate that the Union did not acquiesce in this alleged past practice. The Union repeatedly made proposals which related to the benefits under Article X of the Master Agreement. The fact that Respondents did not agree to these proposals does not mean that the parties did not bargain over these issues.

There is extensive evidence which contradicts the Respondents' assertion that they never bargained with the Union over changes in any System benefit plans. The current Master Agreement, in Article X, Section 2(b) provides that employees shall be permitted to participate in the American Electric Power Paid Parental Leave Plan. That benefit was not included in the prior Master Agreement which was in effect from February 17, 2009 through February 16, 2012. (See Ex. R-2, Article X). The addition of that benefit to Article X of the Master Agreement was obviously bargained and agreed to by the parties. Otherwise, it could not have been included in any current Master Agreement. The fact that it was included in Section 2, rather than Section 1 of Article X, is of no consequence. The paid parental leave plan is an employee benefit just as are the medical plan, dental plan, and dependent care plan listed in Article X, Section 1.

Further, the Respondents' witness, Mr. Dawson, admitted that there were other instances in which the Respondents and the Union bargained for changes to or additions to employee benefits under Article X of the Master Agreement. For example, Mr. Dawson testified that the layoff allowance was eliminated in 2001. However, Mr. Dawson testified that "and then when we bargained for the Master it was the position of the Union that because we had eliminated it in 2001 it was something they really wanted back. So we actually negotiated that, it was Chuck Coleman, who was with 978; . . ." (Tr. Dawson, pp. 241-242). The current Master Agreement does contain a layoff allowance under Article X. (See Ex. S-1, Article X).

In 2011, the Union proposed a three-year freeze on employee healthcare contributions. (Tr., Dawson, pp, 193-196; Ex. R-29). The Union presented this proposal; it was discussed by the parties in negotiations on July 20, and was further discussed on August 17, when the Respondents responded to the proposal. (Tr., Dawson, p. 196). According to Mr. Dawson, the Respondents responded to the proposal by stating that they have a participation concept that includes a percentage of the premiums, that it would shift costs to other employees, that there would be significant costs involved, and that the Respondents had no interest in the proposal. (Tr., Dawson, pp. 194-196; Ex. R-29, p. 4). Thus the evidence clearly establishes that the parties bargained over the medical benefits plan during these negotiations. The fact that the Union later agreed to withdraw the proposal does not mean that the parties did not bargain the issue. As Mr. Dawson acknowledged, the withdrawal of the contract proposals during the course of negotiations is not unusual. In fact, the Respondents have done so themselves on a number of occasions. (Tr., Dawson, p. 253).

Although his testimony as to local negotiations involved only Local 1392, Mr. Dawson identified numerous instances in which that Local Union proposed modifications to the benefits plans, particularly the medical plan, during local contract negotiations. Mr. Dawson testified that Local Union 1392 submitted a proposal in the 2002 negotiations to negotiate benefit plans. (Tr., Dawson, p. 220; Ex. R-30, p. 2). Mr. Dawson testified that the Union made a proposal during negotiations in 1999 to negotiate employee benefits. (Tr., Dawson, pp. 226-228; Ex. R-31, p. 2). Mr. Dawson also identified the following proposals made by the Union during negotiations between the Respondents and Local Union 1392:

• In 1997, the Union proposed a change to the retirement benefit formula. (Tr., Dawson, p. 229; Ex. R-32).

• In 1993, the Union proposed a three-year freeze on medical premiums. (Tr., Dawson, p. 232; Ex. R-37).

Mr. Dawson testified that from time to time the Union made proposals during negotiations regarding modifications to individual plans such as the dental plan and the retirement plan. (Tr., Dawson, p. 227). Whether or not these proposals were ultimately agreed to by the Respondents is not the issue. The fact that the proposals were made and discussed indicates that the parties were in fact bargaining over these benefit plans. Moreover, the fact that the Unions continued to propose changes and modifications to the benefit plans demonstrates that the Union never acquiesced in any assertion by the Respondents that these benefit plans were not subject to bargaining.

As the Board noted in the case of *First Energy and IBEW Local Union* 272, 358 NLRB 96 (2012), at p. 10, "Moreover, the union's demands in bargaining on retiree healthcare for future retirees – such as lifetime vesting – demonstrate a desire by the Union, albeit unsuccessful, to bargain over healthcare for future retirees, even for the period of time that they will be 'out of the box' and covered by First Energy's healthcare plan."

The Board in *First Energy* further noted that "in order to establish a practice that is a continuation of *status quo*, it is necessary to show more than a series of waivers by the union over similar subjects." It is well established that "union acquiescence in past changes to a bargainable subject does not betoken a surrender of the right to bargain the next time the employer might wish to make yet further changes, not even when such further changes arguably are similar to those in which the union may have acquiesced in the past." *Exxon Research Company*, 317 NLRB 675, 686 (1995), enforcement denied on other grounds, 89 F.3d 228 (5th Cir. 1996)." *Id*.

The Board went on to hold that the disparate nature of the change at issue from the changes previously made to its retiree healthcare program precludes the establishment of a past practice necessary to show that the unilateral change at issue in the *First Energy* case was a mere continuation of the *status quo*. The Board held that "none of the prior changes – typically changes in carriers or medical options under the plan – were remotely similar to the elimination of the employer subsidy that is at stake here." *Id*. In the instant case, the complete elimination of medical benefits for retirees is an even more drastic departure from the past changes than were involved in the *First Energy* case. Yet the Board in the *First Energy* case determined that the employer had not met its burden to establish a past practice which justified the unilateral changes at issue.

The Respondents offered Exhibit R-28, a summary of changes made to employee benefits, in support of their past practice argument. However, the changes summarized in that document are different in nature and scope than the complete elimination of the medical insurance benefit. A number of the changes were made simply to comply with changes in the laws regulating health insurance coverage. (Tr., Cooper, pp. 155-156). Some changes involved the elimination of a particular medical vendor. However, those changes did not constitute the elimination of a benefit. (Tr., Cooper, pp. 153-154). Some changes resulted in increasing the lifetime maximum benefit amount. (Ex. R-28, p. 4). Some of the changes resulted in an increased benefit for some employees. (Tr., Cooper, pp. 164-165). Some changes implemented new benefits which were previously not provided. There would obviously be no incentive for the Union to contest many of these changes, particularly those which benefited its members.

The evidence in this case demonstrates that the Respondents have never unilaterally completely eliminated a particular benefit for Union members. AEP asserts that it did so once, in

2011, when it made a change to life insurance benefits available to retirees. The Respondents assert that this change resulted in the complete elimination of the life insurance benefit for retirees hired after January 1, 2011. However, the evidence does not support this assertion. According to the testimony of the Respondents' own witness, the life insurance change in 2011 did not eliminate the ability of retirees hired after January 2011 to retain group life insurance. Rather, employees hired after January 2011 are permitted to continue their group life insurance after retirement if they pay the premiums themselves. (Cooper, Tr. p. 169-170). According to the Respondents' own documents, the change made was that employees hired after January 1, 2011 would not be able to continue "company paid" life insurance coverage into retirement. (Exs. R-16, p. 1 and R-19, p. 2). This language confirms the understanding of witnesses Cooper and Coleman that employees would be able to continue their life insurance benefit into retirement at their own expense.

As is apparent from the record, the Respondents periodically made changes in the amount of monthly premium contributions that they required employees to pay for health insurance. However, modification of these premium contributions did not constitute the elimination of the medical insurance benefit. Likewise, the change regarding life insurance altered the amount of premium to be paid by employees as opposed to the Respondents. However, the change did not eliminate the life insurance benefit completely.

Moreover, even if it were determined that this change regarding the life insurance benefit constituted the complete elimination of a benefit, it would not be sufficient to establish a longstanding past practice similar in scope to the elimination of the medical insurance benefit. The ALJ correctly noted that the provision of a \$30,000.00 term life insurance policy is far different in scope from providing medical insurance for employees. The costs to the Respondents

and/or the individual for these two benefits are obviously vastly different. As acknowledged by the Respondents' witness, Tom Dawson, premiums for life insurance are substantially less than health insurance premiums. (Tr., Dawson, p. 259). Monthly premiums for health insurance are far more expensive than a \$30,000.00 life insurance policy. (Tr., Dawson, p. 260). Under the life insurance benefit, a maximum of \$30,000.00 is payable upon the death of the retiree. In contrast, the health insurance benefit has no cap, and could potentially be worth hundreds of thousands or even millions of dollars to employees who need this benefit to preserve their health or even their lives. Thus, even if it were to be determined that the change to the life insurance benefit in 2011 constituted the elimination of a benefit for a particular group of employees, that change is not similar in scope to the elimination of medical benefits for retirees.

Finally, given that it occurred on one occasion, the change in life insurance benefit in 2011 hardly constitutes a longstanding practice in which the Union acquiesced. In fact, not only did Mr. Cooper testify that life insurance for retirees hired after January of 2011 would still be available at the retirees' expense, the Union's witness also testified that it was his understanding that this group life insurance would be available to retirees at their own expense. (Tr., Coleman, pp. 47-49). Therefore, there was far less incentive for the Union to challenge that unilateral change than the one which occurred with regard to medical insurance benefits for retirees in 2012. The fact that the Union chose not to challenge the modification to the life insurance program in 2011 does not establish a longstanding past practice justifying the action taken by the Respondents in 2012, and it does not constitute a waiver of the Union's right to bargain over this issue.

### 3. The "Reservation of Rights" Provisions of Respondents' Summary Plan Descriptions Do Not Authorize Respondents' Actions.

The Respondents except to the ALJ's conclusion that the "reservation of rights" language does not establish a waiver of retiree health care benefits for employees hired after January 1, 2014. (Exception No. 9). The Respondents offered evidence that the Summary Plan Descriptions (SPD's) for the medical benefit plans contain reservation of rights language which they assert give the Respondents the right to unilaterally modify or eliminate the plans. The ALJ's recommended decision contains a cogent and exhaustive discussion of this issue. (ALJD, pp. 21-27). As noted by the ALJ, the evidence does not support the assertion that this language was incorporated by reference into the Master Agreement. There is no language in the Master Agreement incorporating the language in question by reference. Article X of the Master Agreement does not specifically incorporate the SPD's and in fact makes no reference to these plan documents.

Respondents reliance upon the case of *Amoco Chemical Co.*, 328 N.L.R.B. 1220 (1999), enf. denied subnom. *B P Amoco Corp. v. N.L.R.B.*, 217 F.3d 869 (D.C. Cir. 2000) is misplaced. In that case, the collective bargaining agreements specifically referenced specified employee benefit plans, including the "Amoco Medical Plan" and stated they "are generally set forth in the current Benefits Plan Booklets, although it is understood that certain provisions in the Booklet have been superseded by negotiations between the parties." *Amoco*, 217 F2d at 873. The court therefore concluded that "Because the agreements incorporated the AMP generally, they incorporated all of the Plan provisions not expressly superseded in the agreements, including the reservation of rights clause." *Amoco*, 217 F.2d at 874. The Master Agreement in the instant case contains no such incorporating language.

Even referring to an SPD in a collective bargaining agreement is not sufficient to constitute incorporation by reference into the collective bargaining agreement. See *Bender v*. *Newell Window Furnishings, Inc.* 681 F 3d 253, 264-265 (6<sup>th</sup> Cir. 2012). In the instant case the specific language of Article X provides that employees (and retirees) have a right to participate in the comprehensive medical plan. The Respondents have not eliminated the medical plan. It has mandated that certain retirees may no longer participate in the plan. This runs counter to the express language of the contract.

#### 4. The ALJ Did Not Err in Applying the Language of the Zipper Clause.

Respondents assert that the ALJ erred in concluding that the "zipper clause" in the Master Agreement superseded the reservation of rights provision in the SPD's. However, the ALJ's Decision did not hold that the "zipper Clause" superseded the reservation of rights language. Rather, the ALJ concluded that the reservation of rights language had not been incorporated into the Master Agreement.

The ALJ did reference the "zipper clause" at page 27 of his Decision. However, he did so by reading that language in conjunction with the other language in the Master Agreement contained in Article X, Section 1. The ALJ noted that the Master Agreement, by its terms, ensures the eligibility of employees to participate in retiree health insurance. The ALJ then noted that the language of the "zipper clause" contained in Article III, Section 2 states that it will supersede all prior agreements and understandings and shall govern the entire relationship between the parties. The ALJ then concluded that "since the Agreement by its terms was complete and it made no specific reference to the incorporation of benefit reservation plan rights language for the reasons set forth above, and by the terms of the Agreement itself I find that the plan reservation language was excluded from the collective bargaining agreement." (ALJD at p.

27). This reading of the "zipper clause" in conjunction with the other express language of the contract is not contrary to either of the cases cited by Respondents in support of their argument on this issue.

### 5. There is No Public Policy Which Would Contravene the Conclusions Reached by the ALJ.

Although not referring to a specific Exception, Respondents assert that some compelling public policies demand that the "Courier-Journal rationale" controlled the result in this case. Aside from their assertion that the Respondents' actions will somehow assist them in cost containment, this Section of Respondents' Brief sets forth no legal or factual basis for rejecting any of the conclusions reached by the ALJ. Contrary to Respondents' assertions, there is nothing in the record to support the assertion that failing to reverse the ALJ's Decision would require them to "freeze in place" benefit plans, creating a checkerboard of plans. Rather, adopting the ALJ's Decision would simply result in preventing the Respondents from unilaterally eliminating a substantial benefit for an entire group of employees they had previously agreed to provide.

#### III. CONCLUSION

For all of the foregoing reasons it is respectfully submitted that the ALJ correctly concluded Respondent Company has violated Sections 8(a)(1), (5) and 8(d) of the Act by unilaterally eliminating the retiree medical benefits in question without the Union's consent. Respondents' Exceptions are without merit and should be rejected by the Board. Respondents' Exceptions constitute primarily a repeat of the arguments made in the Respondents' Post Hearing Brief to the Administrative Law Judge, which were thoroughly considered and rejected by the Judge.

The Union therefore requests that the Board deny all of Respondent's Exceptions and that the recommended Decision of Administrative Law Judge Fine be adopted by the Board in its entirety.

Respectfully submitted,

#### /s/ Ronald H. Snyder

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#### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on October 28, 2013, the foregoing Answering Brief was electronically filed with the National Labor Relations Board. Copies of the Post-Hearing Brief were served via electronic mail upon:

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